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5 UNITED STATES DISTRICT COURT  
6 CENTRAL DISTRICT OF CALIFORNIA  
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8 JIM L. BANKS,

9 Plaintiff,

10 v.

11 THE PACIFIC CREST TRAIL

12 ASSOCIATION, et al.,

13 Defendants.  
14

Case No. 8:23-cv-01026-MWF-SSC

REPORT AND  
RECOMMENDATION OF  
UNITED STATES MAGISTRATE  
JUDGE

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17 The Court submits this Report and Recommendation to the  
18 Honorable Michael W. Fitzgerald, United States District Judge,  
19 pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United  
20 States District Court for the Central District of California. The Court  
21 recommends that Defendants' motions to dismiss be granted and this  
22 action be dismissed with prejudice in part and with leave to amend in  
23 part, as Plaintiff has failed to allege sufficient facts to support Article  
24 III standing to bring his equal protection claim and has failed to state a  
25 due process claim on which relief can be granted.  
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## REPORT

### I

“This project is for people who identify as Lesbian, Gay, Bisexual, Transgender, Questioning, Intersex, Asexual, Two-Spirit and other queer identities . . . [.] If you are straight and cisgender please respect that this trail maintenance event is not for you.” (ECF 19 at 6–7.)

These were the words allegedly used by the Pacific Crest Trail Association (PCT Association), a California nonprofit organization, in a website posting seeking volunteers for a trail-maintenance project that had been approved by the U.S. Forest Service and was to occur on land under U.S. Forest Service jurisdiction. (*Id.* at 3, 6–7, 19.) Plaintiff Jim L. Banks has brought suit claiming that, by excluding volunteers based on gender identity and sexual orientation, this solicitation violated equal protection guarantees. (*Id.* at 4.) The suit also contained a second claim alleging that a subsequent investigation by the U.S. Forest Service into his discrimination complaint violated the Due Process Clause. (*Id.* at 21–23.) Banks alleged the following facts.

Banks is an experienced hiker and backpacker. (*Id.* at 3.) Nearly two decades ago, Banks began hiking portions of the Pacific Crest National Scenic Trail, which traverses the western-most states of the United States from Mexico to Canada. (*Id.* at 2–3.) The trail is administered by the Secretary of Agriculture and receives funding from the U.S. Department of Agriculture (USDA) and the U.S. Forest Service. (*Id.*) The PCT Association organizes volunteer maintenance projects on the trail that are approved by the Forest Service. (*Id.* at 3.) Out of a sense of duty to maintain the trail, Banks has volunteered thousands of hours to these maintenance projects in the Southern California portion of the trail and has earned the “Extra Mile Award”

1 from the PCT Association, an honor that goes to “those who have gone  
2 the extra mile, beyond the scope of normal volunteering for the benefit  
3 of the trail.” (*Id.*)

4 In the summer of 2022, Banks was planning a backpacking trip to  
5 northern Washington and thought it would be an opportune time to  
6 fulfill his desire to volunteer for a maintenance project in that area of  
7 the trail. (*Id.* at 6.) At that time, Banks learned from the PCT  
8 Association’s website that in mid-September there was a planned three-  
9 day trail maintenance project at Harts Pass and that the project had  
10 not yet registered the maximum 10 volunteers, making it a “perfect fit”  
11 for Banks’s planned hiking trip to northern Washington. (*Id.*) Banks  
12 then read the description of the project stated above. (*Id.* at 6–7.)

13 Banks, “a straight, heterosexual, biological male,” read this to  
14 mean that he was “prohibit[ed] [] from participating in a volunteer trail  
15 maintenance project on the [trail] solely because of his sexual  
16 orientation and gender identity.” (*Id.* at 7.) “[Banks] contemplated  
17 registering for the project at that point anyway, but thought that he  
18 would not be allowed to or would later be kicked off the list once it was  
19 discovered that he was straight and cisgender.” (*Id.*) The posting had a  
20 “chilling effect” on Banks. (*Id.* at 16.) Banks also had concerns about  
21 how he would be treated and if he would be safe should he volunteer for  
22 the project. (*Id.* at 7.) Banks then logged off the PCT Association’s  
23 website without registering for the project. (*Id.*)

24 In the middle of August, Banks logged back on to the PCT  
25 Association’s website to register for the project “just to see what would  
26 happen.” (*Id.*) “However, by this time the project was full and anyone  
27 trying to register was instead put on a waiting list.” (*Id.*) When Banks  
28 registered for the event, he was not rejected but instead was placed on

1 the waiting list. (*Id.* at 17.) Banks promptly emailed Defendant Wargo,  
2 the PCT Association’s CEO, to notify her “that the project that was  
3 exclusively for the LGBTQIA+ community to the exclusion of people  
4 who are not was discriminatory and a violation of [Banks’s] civil rights,”  
5 and further explained that his email “was intended as a heads-up  
6 warning to [Wargo] to give her a chance to stop the violation of  
7 [Banks’s] civil rights before it happened.” (*Id.* at 10.) Four days later,  
8 having not received a response from Wargo, Banks filed a complaint  
9 with the USDA Office of the Assistant Secretary for Civil Rights. (*Id.* at  
10 11.) After Banks filed this complaint, Wargo responded to his email to  
11 inform him that she was seeking the advice of counsel. (*Id.* at 12.)

12         Meanwhile, Banks’s complaint to the USDA proceeded through  
13 the administrative process and ultimately was referred to the U.S.  
14 Forest Service. (*Id.* at 12–18.) An investigation was conducted by the  
15 U.S. Forest Service, culminating in the rejection of Banks’s complaint.  
16 (*Id.* at 14–18.) Defendant Holzworth authored a letter to Banks  
17 explaining the reasons for the denial of his claim. (ECF 19-2 at 32–33.)  
18 Specifically, Holzworth explained that the PCT Association “did not  
19 deny any sign-ups based on sexual orientation or gender identity,” that  
20 Banks was “not restricted from signing up for the trail work project” but  
21 because the event was full when he registered he was “able to  
22 successfully sign up for the project waitlist,” and ultimately, he “did not  
23 offer sufficient evidence of sexual orientation or gender identity  
24 discrimination” or that he was “denied a benefit to which [he was]  
25 entitled.” (*Id.* at 33.)

26         Banks then filed suit in federal court as an attorney representing  
27 himself. In his First Amended Complaint (FAC), Banks brings a Fifth  
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1 Amendment equal protection claim<sup>1</sup> against the PCT Association, the  
 2 U.S. Forest Service, and Wargo, in her official capacity, for denying  
 3 Banks an opportunity to participate in the volunteer program based on  
 4 his sexual orientation and gender identity. (ECF 19 at 4, 18–20.) He  
 5 also alleges a Fifth Amendment due process violation by the U.S. Forest  
 6 Service and Holzworth, in her official capacity, for the handling of his  
 7 administrative complaint. (*Id.* at 4, 21–23.) Banks brings his claims  
 8 directly under the U.S. Constitution and alleges no statutory violations.  
 9 (*Id.* at 18–23.)

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15 <sup>1</sup> Banks purports to bring his equal protection claim under the  
 16 Fifth and Fourteenth Amendments of the United States Constitution.  
 17 (ECF 19 at 2, 18.) Because Banks is suing federal actors and others he  
 18 alleges were acting under color of federal authority, his claim is  
 19 governed only by the Fifth Amendment’s Due Process Clause, which  
 20 provides equal protection guarantees equivalent to those found in the  
 21 Fourteenth Amendment. *Consejo de Desarrollo Economico de Mexicali,*  
 22 *A.C. v. United States*, 482 F.3d 1157, 1170 n.4 (9th Cir. 2007) (“Federal  
 23 agency[] is not subject to the strictures of the [Fourteenth  
 24 Amendment’s] Equal Protection Clause,” but “the Fifth Amendment’s  
 25 Due Process Clause[] subjects the federal government to constitutional  
 26 limitations that are the equivalent of those imposed on the states by the  
 27 Equal Protection Clause of the Fourteenth Amendment”) (quoting *Stop*  
 28 *H-3 Ass’n v. Dole*, 870 F.2d 1419, 1429 n.18 (9th Cir. 1989)); *but see*  
*United States v. Vaello Madero*, 596 U.S. 159, 167 (2022) (Thomas, J.,  
 concurring) (“Firmer ground for prohibiting the Federal Government  
 from discriminating on the basis of race, at least with respect to civil  
 rights, may well be found in the Fourteenth Amendment’s Citizenship  
 Clause . . . . [L]ocating . . . an equal protection guarantee in the Fifth  
 Amendment’s Due Process Clause raises substantial questions.”).

1 He seeks declaratory and injunctive relief, as well as attorney's  
 2 fees<sup>2</sup> and costs and "such other and further relief as may be just and  
 3 appropriate upon the facts and law at issue herein." (*Id.* at 23–25.)

4 Defendants move to dismiss under Rule 12(b)(1) of the Federal  
 5 Rules of Civil Procedure, asserting that the Court lacks jurisdiction over  
 6 Banks's equal protection claim, and under Rule 12(b)(6), asserting that  
 7 the FAC fails to allege adequately either an equal protection claim or a  
 8 due process claim on which relief can be granted. (ECF 20, 23.)

9 On March 29, 2024, pursuant to the Court's order, the parties  
 10 submitted supplemental briefing on issues of sovereign immunity and  
 11 the availability of a purely constitutional cause of action. (ECF 34–37.)

12 As explained below, the Court finds that the equal protection  
 13 claim should be dismissed with leave to amend, and that the due  
 14 process claim should be dismissed with prejudice.

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 19 <sup>2</sup> Banks seeks an award of attorney's fees under the Equal Access  
 20 to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1). (ECF 19 at 25.)  
 21 However, *pro se* litigants, even if they are attorneys representing  
 22 themselves, cannot receive attorney's fees under the EAJA. *Merrell v.*  
 23 *Block*, 809 F.2d 639, 642 (9th Cir. 1987) (the plain language and the  
 24 purpose of the EAJA "leads to the conclusion that Congress intended  
 25 that an attorney have been retained for a prevailing *pro se* litigant to  
 26 recover attorney's fees under the EAJA"); *see also Kay v. Ehrler*, 499  
 27 U.S. 432, 433–38 (1991) (finding that attorney who represented himself  
 28 was not entitled to attorney's fees under fee-shifting statute 42 U.S.C.  
 § 1988); *Perez-Arellano v. Smith*, 279 F.3d 791, 794 n.3 (9th Cir. 2002),  
*as amended* (Feb. 21, 2002) (finding that EAJA should be interpreted  
 consistently with the Supreme Court's interpretations of other fee-  
 shifting statutes).

## II

As an initial matter, Banks argues that the Court should decline to consider the motion to dismiss filed by the PCT Association and Wargo because they did not comply with the meet-and-confer requirement of Rule 7-3 of the Local Civil Rules for the Central District of California. (ECF 28 at 4–5.) The rule provides that “counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.” C.D. Cal. R. 7-3.

“The district court has considerable latitude in managing the parties’ motion practice and enforcing local rules that place parameters on briefing.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002). “When a party fails to comply with Local Rule 7-3, the Court can, in its discretion, refuse to consider the motion.” *Officia Imaging, Inc. v. Langridge*, No. CV 17-2228-DOC (DFMx), 2018 WL 6137183, at \*5 (C.D. Cal. Aug. 7, 2018); C.D. Cal. R. 7-4 (“The Court *may* decline to consider a motion unless it meets the requirements of L. R. 7-3 through 7-8.” (emphasis added)). “Failure to comply with the Local Rules does not automatically require the denial of a party’s motion, however, particularly where the non-moving party has suffered no apparent prejudice as a result of the failure to comply.” *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1088 (C.D. Cal. 2015). “If a party does not suffer any prejudice as a result of non-compliance with [Local Rule] 7-3, the Court may still consider the merits of the motion[.]” *Ngo v. County of Riverside*, No. EDCV 18-00080 JGB (KKx), 2019 WL 3293184, at \*2 (C.D. Cal. Mar. 28, 2019); *Officia Imaging, Inc.*, 2018 WL 6137183, at \*5 (electing to consider the merits of defendants’ motion to dismiss where plaintiff had suffered no apparent prejudice).



1 Here, the PCT Association and Wargo submit that they conferred  
2 with Banks after the filing of the original complaint to discuss the  
3 complaint and “Defendants’ responsive pleading,” and, at that time,  
4 “identified deficiencies” in the complaint. (ECF 20 at 2; ECF 30 at 2.)  
5 When Banks failed to correct these deficiencies in the FAC, they filed  
6 the motion. (ECF 20 at 2; ECF 30 at 2.) Even assuming that this is a  
7 violation of the rule, Banks makes no attempt to establish how he was  
8 prejudiced; he merely argues that these defendants did not comply with  
9 the rule. (ECF 28 at 4–5.) Neither is it apparent how Banks could have  
10 been prejudiced where the arguments raised in the motion are  
11 materially identical to those raised in the motion to dismiss filed by the  
12 U.S. Forest Service and Holzworth, and where Banks has not disputed  
13 the adequacy of the meet-and-confer on the second motion. In the  
14 absence of a showing of prejudice, it is appropriate for the Court to  
15 exercise its discretion to consider the motion. *See De Walshe v. Togo’s*  
16 *Eateries, Inc.*, 567 F. Supp. 2d 1198, 1201 n.1 (C.D. Cal. 2008); *Wilson-*  
17 *Condon v. Allstate Indem. Co.*, No. CV 11-05538 GAF (PJWx), 2011 WL  
18 3439272, at \*1 (C.D. Cal. Aug. 4, 2011).



### III

#### A

Banks sues Defendants as federal actors<sup>3</sup> and asserts that the Court has jurisdiction pursuant to two statutes. (ECF 19 at 2, 19.) The first, 28 U.S.C. § 1331, is properly invoked as it states that “district courts shall have original jurisdiction of all civil actions arising under the Constitution . . . of the United States” and Banks brings his claims directly under the Constitution. That is not the end of the inquiry, however. “The plaintiff in a lawsuit against the United States must point to an unequivocal waiver of sovereign immunity.” *Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998); see *Mills v. United States*, 742 F.3d 400, 404 (9th Cir. 2014) (“Suits against the government are barred for lack of subject matter jurisdiction unless the government expressly and unequivocally waives its sovereign immunity.”) Though not invoked in the FAC, the parties agreed through supplemental briefing<sup>4</sup> that because Banks seeks only equitable relief, the Administrative Procedure Act (APA), 5 U.S.C. § 702 *et seq.*, provides the required waiver of sovereign immunity. (ECF 35 at 3; ECF 36 at 20–24); see *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 215 (2012); *Blue*, 162 F.3d at 544–45.

#### B

The second statute listed by Banks, 28 U.S.C. § 1346(a)(2), does not confer jurisdiction. Section 1346(a)(2) provides for federal district

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<sup>3</sup> For purposes of the analysis, the Court will presume that the PCT Association and Wargo are federal actors.

<sup>4</sup> The Court requested supplemental briefing on the issue of sovereign immunity as “rules [of subject matter jurisdiction] can never be waived or forfeited, [and] courts are obligated to raise them *sua*

1 court jurisdiction, concurrently with the United States Court of Federal  
 2 Claims over civil cases “against the United States, not exceeding  
 3 \$10,000 in amount, founded . . . upon the Constitution . . . .” By its  
 4 plain terms, § 1346(a)(2), known as the Little Tucker Act, authorizes  
 5 only actions for monetary damages, not the equitable relief Banks  
 6 seeks. *Lee v. Thornton*, 420 U.S. 139, 140 (1975) (“The [Little] Tucker  
 7 Act empowers district courts to award damages but not to grant  
 8 injunctive or declaratory relief.”); *Richardson v. Morris*, 409 U.S. 464,  
 9 465 (1973) (Section 1346(a)(2) “has long been construed as authorizing  
 10 only actions for money judgments and not suits for equitable relief  
 11 against the United States”); *Price v. U.S. Gen. Servs. Admin.*, 894 F.2d  
 12 323, 324 (9th Cir. 1990) (“The Little Tucker Act authorizes the district  
 13 courts to hear monetary claims against the United States, so long as  
 14 they do not exceed \$10,000. The Act does not, however, authorize the  
 15 district courts to grant declaratory or equitable relief against the United  
 16 States.”).

17 That the Little Tucker Act does not authorize claims for equitable  
 18 relief is inherent in the purpose of the statute and its relation to the  
 19 Tucker Act. The United States Court of Federal Claims is vested with  
 20 jurisdiction over non-tort claims against the United States under the  
 21 Tucker Act, 28 U.S.C. § 1491(a)(1). Through the companion Little  
 22 Tucker Act, Congress granted the federal district courts jurisdiction  
 23 concurrent with the Claims Court over non-tort claims against the  
 24 United States for monetary damages up to \$10,000. 28 U.S.C.  
 25 § 1346(a)(2). However, except in very limited circumstances not present

26 \_\_\_\_\_  
 27 *sponte* if the parties fail to do so . . . .” *United States v. Bastide-*  
 28 *Hernandez*, 39 F.4th 1187, 1190 (9th Cir. 2022), *cert. denied*, 143 S. Ct.  
 755 (2023).

1 here, the Claims Court does not have jurisdiction to award equitable  
2 relief under the Tucker Act, and, thus, neither does the district court  
3 under its concurrent jurisdiction pursuant to the Little Tucker Act. *See*  
4 *Bowen v. Massachusetts*, 487 U.S. 879, 905 & n.40 (1988) (explaining  
5 that “[t]he Claims Court does not have the general equitable powers of a  
6 district court to grant prospective relief” and the Supreme Court has  
7 “stated categorically that ‘the Court of Claims has no power to grant  
8 equitable relief,’” but recognizing the Claims Court’s authority to grant  
9 equitable relief in limited scenarios under § 1491(a)(2)–(3) (quoting  
10 *Richardson*, 409 U.S. at 465)). Accordingly, the Little Tucker Act is not  
11 properly invoked in this case.

12 The Court is unpersuaded by Banks’s argument that district  
13 courts may exercise jurisdiction over a claim for nonmonetary relief  
14 under the Little Tucker Act. (ECF 36 at 7–9.) He relies on *N. Side*  
15 *Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir. 1985) and *N. Star Alaska*  
16 *v. United States*, 9 F.3d 1430 (9th Cir. 1993). He has misconstrued  
17 those cases.

18 The question presented in those cases was not whether the Little  
19 Tucker Act affirmatively *granted* jurisdiction for a claim for  
20 nonmonetary relief under the Little Tucker Act. Rather, the question  
21 presented was whether the Little Tucker Act *precluded* jurisdiction by  
22 prohibiting a waiver of sovereign immunity for a claim that otherwise  
23 fell within the APA’s general waiver of sovereign immunity for  
24 equitable claims against the United States. *N. Star Alaska*, 9 F.3d at  
25 1432; *N. Side Lumber Co.*, 753 F.2d at 1484–85. Through § 702 of the  
26 APA, the United States has broadly waived sovereign immunity for  
27 claims for equitable relief against the United States, but the section  
28 does not “confer[] authority to grant relief if any other statute that

1 grants consent to suit expressly or impliedly forbids the relief which is  
 2 sought.” 5 U.S.C. § 702. In *N. Side Lumber Co.*, the Ninth Circuit  
 3 explained that the legislative history of the APA showed Congress’s  
 4 intent that the Little Tucker Act be such a prohibition on a waiver of  
 5 sovereign immunity under § 702 where the claim at issue is based on a  
 6 contract. 753 F.2d at 1485. Thus, the court found that the contractual  
 7 claim at issue was barred by sovereign immunity because the Little  
 8 Tucker Act prohibited the application of the APA’s waiver of immunity.  
 9 *Id.* at 1485–86. Conversely, the court found that the statutory claim  
 10 was permitted, not because the Little Tucker Act granted jurisdiction  
 11 and waived sovereign immunity, but because the claim fell within the  
 12 APA’s broad waiver of sovereign immunity and the waiver was not  
 13 prohibited by the Little Tucker Act because the claim was not based on  
 14 a contract. *Id.* Because the Little Tucker Act does not waive sovereign  
 15 immunity for Banks’s claim for nonmonetary relief, he may not proceed  
 16 under such a theory in this action.

#### 17 IV

18 Defendants U.S. Forest Service and Holzworth argue that Banks  
 19 has failed to state a Fifth Amendment due process claim on which relief  
 20 can be granted. (ECF 23 at 11–12.) The Court agrees.

#### 21 A

22 Under Rule 12(b)(6), a defendant may move to dismiss for failure  
 23 to state a claim upon which relief can be granted. Fed. R. Civ. P.  
 24 12(b)(6). A plaintiff must allege “enough facts to state a claim to relief  
 25 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
 26 570 (2007). A claim has “facial plausibility” if the plaintiff pleads facts  
 27 that “allow[ ] the court to draw the reasonable inference that the  
 28

1 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556  
 2 U.S. 662, 678 (2009). All well-pleaded facts must be taken as true. *Id.*

3 The Due Process Clause of the Fifth Amendment protects  
 4 individuals against a deprivation of life, liberty, or property that  
 5 “shocks the conscience” or “interferes with rights implicit in the concept  
 6 of ordered liberty” (substantive due process) or that is not “implemented  
 7 in a fair manner” (procedural due process). *United States v. Salerno*,  
 8 481 U.S. 739, 746 (1987) (cleaned up). “A threshold requirement to a  
 9 substantive or procedural due process claim [under the Fifth  
 10 Amendment] is the plaintiff’s showing of a liberty or property interest  
 11 protected by the Constitution.” *Ching v. Mayorkas*, 725 F.3d 1149, 1155  
 12 (9th Cir. 2013); *see Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)  
 13 (“Procedural due process imposes constraints on government decisions  
 14 which deprive individuals of ‘liberty’ or ‘property’ interests within the  
 15 meaning of the Due Process Clause of the Fifth or Fourteenth  
 16 Amendment.”).

## 17 **B**

18 Here, taking as true the facts alleged, Banks has not met this  
 19 threshold requirement. He alleges only that the review of his  
 20 discrimination complaint was not “a just, fair, unbiased, and  
 21 professional” one. (ECF 19 at 21–23.) He points to no recognized  
 22 liberty or property interest of which he was deprived by the  
 23 government’s allegedly inadequate investigation. *See, e.g., Contra*  
 24 *Mathews*, 424 U.S. at 332 (“the interest of an individual in continued  
 25 receipt of [social security] benefits is a statutorily created “property”  
 26 interest protected by the Fifth Amendment”); *Goldberg v. Kelly*, 397  
 27 U.S. 254, 262 (1970) (finding a federally created property interest in  
 28

1 welfare benefits and reiterating property interests in unemployment  
2 compensation, tax exemption, and public employment).

3 With no liberty or property interests at stake, due process  
4 protections are not triggered. *See Vinyard v. Wilson*, 311 F.3d 1340,  
5 1356 (11th Cir. 2002) (affirming summary judgment grant on due  
6 process claim for lack of liberty or property interest where “[Plaintiff]  
7 does not cite, nor have we found, any federal or state court decision,  
8 statute, regulation or other source of law that gives [Plaintiff] an  
9 entitlement to an internal investigation by the Sheriff’s Office of her  
10 complaints of police brutality”); *Francis-Sobel v. Univ. of Maine*, 597  
11 F.2d 15, 17 (1st Cir. 1979) (“the [EEOC’s] action neither deprived the  
12 appellant of any interest she may have had independent of the EEOC  
13 nor denied her such substantial EEOC-administered benefits as to give  
14 rise to a constitutional claim”); *Richardson v. Sauls*, 319 F. Supp. 3d 52,  
15 70 (D.D.C. 2018) (“alleged improper handling of an EEO complaint does  
16 not give rise to a constitutional violation”); *London v. City of Redlands*,  
17 No. EDCV 17-0185-JFW (KK), 2017 WL 3953984, at \*4 (C.D. Cal. Sept.  
18 5, 2017) (rejecting procedural and substantive due process theories  
19 because plaintiff did not have a liberty or property interest at stake in  
20 claim regarding the alleged failure to investigate a citizen complaint,  
21 including allegation that he was entitled “to have a fair and impartial  
22 fact-finding by the city of Redlands when such request/complaint are  
23 made by private citizens” (cleaned up)), *report and recommendation*  
24 *adopted*, No. EDCV 17-0185-JFW (KK), 2017 WL 3927452 (C.D. Cal.  
25 Sept. 7, 2017); *Page v. Stanley*, No. CV 11-2255 CAS (SS), 2013 WL  
26 2456798, at \*7, 9–10 (C.D. Cal. June 5, 2013) (finding plaintiff had no  
27 due process interest to support his claim that employees of the  
28 California Highway Patrol “fail[ed] to ‘exercise independent judgment’



1 and conduct a thorough investigation of the allegations in his citizen's  
 2 complaint"); *Morrow v. City of Oakland*, No. C 11–02351 LB, 2012 WL  
 3 2133755, at \*15 (N.D. Cal. June 12, 2012) (there is no due process  
 4 interest to receive a policy-compliant and “impartial” EEOC  
 5 investigation of complaints); *Bernstein v. New York*, 591 F. Supp. 2d  
 6 448, 460 (S.D.N.Y. 2008) (no due process liberty or property interest in  
 7 investigation of citizen complaint); *Hall v. EEOC*, 456 F. Supp. 695,  
 8 702–03 (N.D. Cal. 1978) (dismissing a due process cause of action in a  
 9 case brought by private plaintiffs against the EEOC because “[c]hanges  
 10 made by the EEOC in the scope and extent of [its] investigative and  
 11 non-adjudicatory procedures are simply not within the due process  
 12 clause”).<sup>5</sup> As Banks has shown no due process interest, this claim fails  
 13 as a matter of law and must be dismissed.

## V

14  
 15 Banks’s equal protection claim must also be dismissed. As  
 16 currently pleaded, Banks lacks Article III standing for the declaratory  
 17 and injunctive relief he seeks.<sup>6</sup>

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18  
 19 <sup>5</sup> Although some of these cases address Fourteenth Amendment  
 20 due process claims involving state, rather than federal, action, the  
 21 Fourteenth Amendment merely incorporates the Due Process Clause of  
 22 the Fifth Amendment and makes the due process protections applicable  
 23 to actions by the state. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).  
 24 Accordingly, authority addressing Fourteenth Amendment due process  
 25 claims is equally applicable to Banks’s Fifth Amendment claim. *See*  
*Erickson v. United States ex rel. Dep’t of Health & Hum. Servs.*, 67 F.3d  
 858, 861 (9th Cir. 1995); *London*, 2017 WL 3953984, at \*2.

26 <sup>6</sup> Defendants move to dismiss this claim due to lack of standing  
 27 but their analysis fails to account for the relief sought. (ECF 20-1 at  
 11–12; ECF 23 at 6–8.) Although the Court is permitted to consider  
 28 facts beyond the complaint in ruling on 12(b)(1) motions, the parties do



**A**

Article III of the Constitution requires courts to adjudicate only actual cases or controversies. U.S. Const. art. III, § 2, cl. 1. “A suit brought by a plaintiff without Article III standing is not a ‘case or controversy,’ and an Article III federal court therefore lacks subject matter jurisdiction over the suit.” *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). “Standing is determined by the facts that exist at the time the complaint is filed.” *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). The plaintiff bears the burden of demonstrating standing, *TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–31 (2021), and must do so “for each type of relief sought,” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

**B**

Banks seeks an injunction preventing Defendants “from denying, restricting, or discouraging anyone from participating in trail maintenance projects on the [trail] because of their sex, gender identity, or sexual orientation.” (ECF 19 at 23–24.) To obtain this injunctive relief, he must have alleged that he is facing additional impending injury, not solely past harm. He has failed to do so.

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not supply outside facts related to standing for the relief sought. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Thus, the Court considers only the allegations in the FAC, accepts them as true, and construes them in Banks’s favor. *Warth v. Seldin*, 422 U.S. 490, 501–02 (1975) (“For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.”).

1

2 “To seek injunctive relief, a plaintiff must show that he is under  
3 threat of suffering ‘injury in fact’ that is concrete and particularized;  
4 that threat must be actual and imminent, not conjectural or  
5 hypothetical; it must be fairly traceable to the challenged action; and it  
6 must be likely that a favorable judicial decision will prevent or redress  
7 the injury.” *Summers*, 555 U.S. at 493. “Past exposure to illegal  
8 conduct does not in itself show a present case or controversy regarding  
9 injunctive relief . . . if unaccompanied by any continuing, present  
10 adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *see*  
11 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (future harm  
12 required to show standing for injunctive relief); *Munns v. Kerry*, 782  
13 F.3d 402, 411–12 (9th Cir. 2015) (“Despite being harmed in the past, [a  
14 plaintiff] must still show that the threat of injury in the future is  
15 certainly impending or that it presents a substantial risk of recurrence  
16 for the court to hear [a] claim for prospective relief.” (cleaned up)). To  
17 meet this standard, a plaintiff must offer some “concrete facts” to  
18 substantiate his fears that the defendants will again harm him in a  
19 similar way, and the “threatened injury must be certainly impending.”  
20 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, 414 n.5 (2013)  
21 (cleaned up). Further, that threat of future harm must have existed at  
22 the time the plaintiff first sued in federal court. *See Gonzalez v. United*  
23 *States Immigr. & Customs Enf’t*, 975 F.3d 788, 803 (9th Cir. 2020)  
24 (“Thus, we assess Gonzalez’s standing for prospective injunctive relief  
25 as of the time when he commenced suit, relying on the allegations in the  
26 operative amended complaint.”).

27 A plaintiff may point to a policy or practice of a governmental  
28 agency to meet this requirement. For example, in *City of Los Angeles v.*

1 *Lyons*, the plaintiff was subjected to an unconstitutional chokehold by  
2 City of Los Angeles police officers and sought injunctive relief to  
3 prevent them from using chokeholds in the future. 461 U.S. 95, 97–98  
4 (1983). The Supreme Court held that he could not seek injunctive relief  
5 because he had no evidence that he would be subjected to an  
6 unconstitutional chokehold again. *Id.* at 105–06. The Court provided  
7 two primary examples of how a plaintiff could show the required “real  
8 or immediate threat” of recurring harm for purposes of establishing  
9 standing: “(1) that *all* police officers in Los Angeles *always* choke any  
10 citizen with whom they happen to have an encounter, whether for the  
11 purpose of arrest, issuing a citation or for questioning or, (2) that the  
12 City ordered or authorized police officers to act in such manner.” *Id.* at  
13 106.

14 Similarly, in *Armstrong v. Davis*, the Ninth Circuit identified two  
15 ways in which a plaintiff can demonstrate that a past injury was likely  
16 to recur to establish standing for prospective equitable relief. 275 F.3d  
17 849, 861 (9th Cir. 2001), *abrogated on other grounds by Johnson v.*  
18 *California*, 543 U.S. 499 (2005); *see Mayfield v. United States*, 599 F.3d  
19 964, 971 (9th Cir. 2010) (recognizing *Armstrong*’s identification of two  
20 ways to show likely recurrence of injury so that injury is ongoing for  
21 purposes of Article III standing). “First, a plaintiff may show that the  
22 defendant had, at the time of the injury, a written policy, and that the  
23 injury ‘stems from’ that policy.” *Armstrong*, 275 F.3d at 861. “Second,  
24 the plaintiff may demonstrate that the harm is part of a ‘pattern of  
25 officially sanctioned . . . behavior, violative of the plaintiffs’ [federal]  
26 rights.’” *Id.* (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir.  
27 1985)).  
28

1        Thus, under *Lyons* and *Armstrong*, a plaintiff may show a  
 2 sufficient injury for standing to pursue prospective equitable relief by  
 3 identifying “specific [] policies and practices that would subject [him] to  
 4 a realistic possibility” of future harm. *Updike v. Multnomah County*,  
 5 870 F.3d 939, 948 (9th Cir. 2017).

## 2

7        Here, Banks seeks relief based on a discrete prior alleged violation  
 8 without any additional allegations that, at the time he brought suit, the  
 9 violation was likely to recur. For example, he has not alleged that  
 10 Defendants always limit trail-maintenance programs to LGBTQ+  
 11 volunteers to the exclusion of heterosexual, cisgender volunteers,  
 12 whether based on a written policy or otherwise. *See Lyons*, 461 U.S. at  
 13 106; *Armstrong*, 275 F.3d at 861. Neither has Banks alleged that  
 14 Defendants have engaged in similar discriminatory practices so  
 15 regularly in the past as to support an inference that they will continue  
 16 to do so in the future. *See Armstrong*, 275 F.3d at 861.

17        Because Banks has failed to allege a concrete threat that  
 18 Defendants will harm him again in a similar manner, he has not  
 19 sufficiently alleged injury for purposes of Article III standing to seek  
 20 prospective equitable relief. *See Munns*, 782 F.3d at 411–12  
 21 (considering challenge to government policies related to the response to  
 22 kidnappings of American citizens in Iraq and finding plaintiffs who  
 23 suffered past harm could not establish sufficient threat of future harm);  
 24 *Rosenblum v. Does 1-10*, 474 F. Supp. 3d 1128, 1136–37 (D. Or. 2020)  
 25 (in action by State of Oregon seeking to enjoin federal agencies from  
 26 seizing protesters, court rejected State’s argument that a risk of future  
 27 harm existed where State had not presented evidence of any official  
 28 orders or policies in favor of the allegedly illegal seizures, that these

1 allegedly illegal seizures are a widespread practice, or that the allegedly  
2 illegal seizures had happened more than twice, and finding the State’s  
3 argument “rests on too little evidence to satisfy *Lyons*”); *Mehr v. Fed’n*  
4 *Internationale de Football Ass’n*, 115 F. Supp. 3d 1035, 1057–58 (N.D.  
5 Cal. 2015) (where soccer players sued soccer organizations for failing to  
6 provide adequate concussion-management, court found plaintiffs lacked  
7 standing to seek injunctive relief because plaintiffs had not alleged that  
8 any plaintiff was at risk of future head injury and that the arguments  
9 in favor of such an injury were vague, conclusory, speculative, and  
10 nebulous); *Morning Star Packing Co. v. SK Foods, L.P.*, 754 F. Supp. 2d  
11 1230, 1238 (E.D. Cal. 2010) (finding plaintiff lacked standing to bring  
12 claim for injunctive relief where the complaint was “devoid of any facts  
13 indicating that Defendants are likely to continue utilizing” the  
14 challenged practices); *McCarron v. County of Ventura*, No. CV 21-5234  
15 MWF (PDx), 2021 WL 9315371, at \*3–4, 6 (C.D. Cal. Dec. 29, 2021) (in  
16 action by property owner against neighbors for opposing her application  
17 to convert a permitted garage into a residence, citing *Lujan*, *Lyons*, and  
18 *Mayfield*, the court found plaintiff had not alleged a sufficient future  
19 harm for purposes of standing to seek injunctive relief because the  
20 plaintiff had “not allege[d] that she plans to re-file her permit  
21 application or that [the defendants] w[ould] re-submit letters in  
22 opposition to the application”).

## C

Banks also seeks a declaration that “Defendants PCTA, Wargo, and US Forest Service violated Plaintiff’s rights under the Equal Protection Clause of the Fourteenth Amendment<sup>[7]</sup> to the U.S. Constitution when they excluded Plaintiff from participating in the trail maintenance project because of his gender identity and sexual orientation.” (ECF 19 at 23.) However, he has not met Article III’s redressability requirement.

## 1

The Declaratory Judgment Act provides that “in a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. § 2201(a). Courts, however, “are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.” *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). Thus, “a declaratory judgment merely adjudicating past violations of federal law—as opposed to continuing or future violations of federal law—is not an appropriate exercise of federal jurisdiction.” *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 868 (9th Cir. 2017). “The real value of the judicial pronouncement—what makes it a proper judicial resolution of a ‘case or controversy’ rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.” *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis in original).

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<sup>7</sup> As noted above, Banks’s claim against alleged federal actors is governed by the Fifth Amendment, not the Fourteenth Amendment.

1 Stated differently, Article III requires that the relief sought be  
 2 likely to redress a plaintiff's injuries. *Juliana v. United States*, 947  
 3 F.3d 1159, 1170 (9th Cir. 2020). As the Supreme Court has explained,  
 4 "By the mere bringing of his suit, *every* plaintiff demonstrates his belief  
 5 that a favorable [declaratory] judgment will make him happier.  
 6 But . . . that psychic satisfaction is not an acceptable Article III remedy  
 7 because it does not redress a cognizable Article III injury." *Steel Co. v.*  
 8 *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (emphasis in  
 9 original).

## 2

11 Here, Banks has provided no basis upon which to conclude that  
 12 declaratory relief might affect Defendants' future behavior. And this is  
 13 not the type of circumstance in which courts have found that future  
 14 behavior might be impacted by a declaration of wrongdoing such as  
 15 where an ongoing contractual or statutory obligation exists between the  
 16 parties. *See, e.g., Redd v. Guerrero*, 84 F.4th 874, 884–86 (9th Cir.  
 17 2023) (finding standing to seek declaratory relief where prisoner  
 18 plaintiff sued state judicial officers for failing to expeditiously appoint  
 19 postconviction habeas counsel as required by state statute, where  
 20 declaration would increase the likelihood that the state would provide  
 21 plaintiff with the counsel he sought); *Mendoza v. Strickler*, 51 F.4th  
 22 346, 354 n.5 (9th Cir. 2022) (plaintiff could show redressability where  
 23 she challenged the constitutionality of Oregon's then-applicable system  
 24 of suspending the driver's license of individuals who failed to pay traffic  
 25 fines, and the challenged rule was a substantial obstacle in plaintiff's  
 26 ability to regain her license); *Ochoa v. Pub. Consulting Grp., Inc.*, 48  
 27 F.4th 1102, 1107 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 783 (2023)  
 28 (finding plaintiff had standing to seek declaratory relief where she



1 “ha[d] already had union dues erroneously withheld from her paycheck  
2 twice and remain[ed] employed with the State and therefore at risk of  
3 additional unauthorized withholdings”); *Ctr. for Biological Diversity v.*  
4 *Mattis*, 868 F.3d 803, 818–21 (9th Cir. 2017) (finding plaintiff had  
5 standing to seek declaratory relief on claim that the government failed  
6 to discharge a statutory procedural requirement and a declaratory  
7 judgment would have the effect of ordering the government to comply  
8 with the statutory requirement); *Burlington N. R. Co. v. Crow Tribal*  
9 *Council*, 940 F.2d 1239, 1243 (9th Cir. 1991) (railroad had standing to  
10 seek declaratory judgment invalidating tribal ordinance establishing a  
11 commission to regulate railroads crossing reservation land); *Bjornstad*  
12 *v. Senior Am. Life Ins. Co.*, 599 F. Supp. 2d 1165, 1170–73 (D. Ariz.  
13 2009) (interpreting a term in an insurance policy and issuing a  
14 declaratory judgment that plaintiff was entitled to benefits under the  
15 policy).

16 Because any declaration would be nothing more than a  
17 retrospective opinion, Banks lacks standing to seek this form of relief.  
18 *See Mendia v. Garcia*, 165 F. Supp. 3d 861, 894 (N.D. Cal. 2016)  
19 (declining to issue a retrospective declaratory judgment that defendants  
20 violated plaintiff’s rights); *Zhang v. United States*, No. C19-1211-RSM,  
21 2020 WL 2114500, at \*6 (W.D. Wash. May 4, 2020) (finding  
22 retrospective declaratory relief unavailable for Fifth Amendment claims  
23 against federal defendants); *Rodriguez v. Tilton*, No. 2:08-cv-1028 GEB  
24 AC P, 2015 WL 3507126, at \*2 (E.D. Cal. June 3, 2015) (holding that  
25 federal courts are “not empowered to issue retrospective declaratory  
26  
27  
28

1 relief with respect to allegedly unconstitutional conduct that has  
2 ended”).<sup>8</sup>

3 \*\*\*

4 As Banks has no standing for the relief he seeks, the Court may  
5 not exercise jurisdiction over his equal protection claim as currently  
6 pleaded.<sup>9</sup>

## 7 VI

8 Rule 15 of the Federal Rules of Civil Procedure provides that leave  
9 to amend should be freely given “when justice so requires.” Fed. R. Civ.  
10 P. 15(a)(2). Although a district court generally should grant a *pro se*  
11 plaintiff leave to amend “unless it is absolutely clear that the  
12 deficiencies of the complaint could not be cured by amendment,” *Akhtar*

13  
14 \_\_\_\_\_  
15 <sup>8</sup> Banks also seeks declaratory and injunctive relief on his due  
16 process claim against Holzworth and the U.S. Forest Service. (ECF 19  
17 at 24–25.) These defendants did not move to dismiss this claim based  
18 on standing. (ECF 23.) However, the Court must consider *sua sponte*  
19 the issue of Banks’s standing to bring such claim. *D’Lil v. Best W.*  
20 *Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008) (“[B]oth the  
21 Supreme Court and this court have held that whether or not the parties  
22 raise the issue, federal courts are *required sua sponte* to examine  
23 jurisdictional issues such as standing.” (cleaned up)). Having done so,  
24 the Court finds that, even if Banks’s due process claim was not subject  
25 to dismissal for failing to state the requisite liberty or property interest,  
26 it would be subject to dismissal for lack of standing for the same  
27 reasons his equal protection claim must be dismissed: Banks has not  
28 alleged the requisite injury for the equitable relief he seeks.

<sup>9</sup> Because the Court finds that the equal protection claim must be  
dismissed for lack of Article III standing, it does not address the further  
arguments that Defendants Wargo and the PCT Association are not  
state actors, and that Banks has failed to state an equal protection  
claim. (ECF 20-1 at 12–18; ECF 23 at 8–11.)

1 *v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012), leave to amend may be  
2 denied where it would be futile, *Cervantes v. Countrywide Home Loans,*  
3 *Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (“Although leave to amend  
4 should be given freely, a district court may dismiss without leave where  
5 a plaintiff’s proposed amendments would fail to cure the pleading  
6 deficiencies and amendment would be futile.”).

7 Here, because Banks has shown no liberty or property interest at  
8 stake, he cannot state a due process claim and any amendment to that  
9 claim would be futile. Thus, Banks’s due process claim should be  
10 dismissed with prejudice. In addition, because this claim must be  
11 dismissed with prejudice, and because Defendant Holzworth is named  
12 only in this claim, she should be dismissed from this action with  
13 prejudice.

14 Further, because Banks has not alleged facts sufficient to show  
15 standing for the relief he seeks on his equal protection claim, it should  
16 be dismissed. However, because it is conceivable that Banks could  
17 amend his complaint to allege the requisite injury, he should be given  
18 leave to amend this claim.

19 In sum, Banks should be given leave to file a second amended  
20 complaint that contains only an equal protection claim under the Fifth  
21 Amendment against the PCT Association, the U.S. Forest Service, and  
22 Wargo, that does not invoke the Little Tucker Act as a basis for  
23 jurisdiction, and that sufficiently alleges the requisite harm to meet the  
24 requirements for Article III standing, as discussed above. *See*  
25 *McCarron*, 2021 WL 9315371, at \*3–6 (dismissing claim with leave to  
26 amend after finding the plaintiff had not shown a sufficient future harm  
27 for purposes of standing to seek injunctive relief).

**RECOMMENDATION**

For the reasons above, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; (2) granting Defendants' motions to dismiss; (3) dismissing Banks's due process claim with prejudice; (4) dismissing Defendant Holzworth from this action with prejudice; (5) dismissing Banks's equal protection claim with leave to amend; and (6) granting Banks leave to file, within 30 days of the District Judge's order, a second amended complaint consistent with this Report.

DATED: May 22, 2024



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HONORABLE STEPHANIE S. CHRISTENSEN  
UNITED STATES MAGISTRATE JUDGE